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No. 79-1128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE STATE OF MONTANA, ET AL.,
Petitioners

v.

THE UNITED STATES OF AMERICA AND
THE CROW TRIBE OF INDIANS, MONTANA,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES ON THE MERITS

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INTERNATIONAL ASSOCIATION OF
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TABLE OF CONTENTS

	Page
INTEREST OF AMICUS	1
SUMMARY OF ARGUMENT	3
ARGUMENT	
The State of Montana Possesses Exclusive Authority to Regulate Hunting and Fishing By Non-Tribal Members on Fee Patented Lands Within the Crow Reservation. Any Impairment Of Treaty Rights By Non-Tribal Members on Fee-Patented Lands Must Be Vindicated By Application To the Legislature or the Courts And Not By Tribal Regulation	4
1. The Extent of Tribal Jurisdiction Over Non-Tribal Members is Not Co-Extensive With the Need to Preserve Indian Treaty Rights	6
2. Congress Deliberately Chose to Exclude Fee Patented Lands From the Provisions of the Federal Trespass Statute	8
3. The Court of Appeals Has Ascribed to the Tribe a Right to Regulate, but the Power To Enforce its Regulations is Not Apparent	10
4. The State Possesses "Complete and Perfect" Jurisdiction Over Non-Indians on Fee Patent Lands, and Tribal Power is Not Essential to Supplement Ineffective State Regulation	14
CONCLUSION	15

TABLE OF AUTHORITIES

	Page
CASES:	
Dillon v. Antler Land Co., 507 F.2d 940 (9th Cir. 1974), cert. denied, 421 U.S. 992 (1975)	14
Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Comm'n, 588 F.2d 75 (4th Cir. 1978), petition for writ of certiorari voluntarily dismissed, 48 U.S.L.W. 3786 (May 22, 1980)	5
Ex Parte Crosby, 38 Nev. 389, 149 Pac. 989 (1915)	5
Mescalero Apache Tribe v. New Mexico, Civ. No. 77-395M (D.N.M. August 2, 1978), appeal docketed, No. 78-1790 (10th Cir. September 29, 1978)	5
Montana ex rel. Nepstad v. Danielson, 149 Mont. 438, 427 P.2d 689 (1967)	4
Oklahoma Tax Comm'n v. Texas Co., 336 U.S. 342 (1949)	13
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)	6,10
Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974)	10,14
Seymour v. Superintendent, 368 U.S. 351 (1962)	10
United States v. Bouchard, 464 F. Supp. 1316 (W. D. Wisc. 1978)	10
United States v. Mazurie, 419 U.S. 544 (1975)	6,7,13
United States v. Montana, 604 F.2d 1162 (9th Cir. 1979)	2,7,11 13
United States v. Pollman, 364 F. Supp. 995 (D. Mont. 1973)	10,11
United States v. Sanford, 547 F.2d 1085 (9th Cir. 1976)	4
United States v. Washington, 384 F.Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976)	8,13

	Page
United States v. Wheeler, 435 U.S. 313 (1978)	7
Wedding v. Meyler, 192 U.S. 573 (1904)	10
White Mountain Apache Tribe v. Arizona, No. Civ. 77-867 (D. Ariz. June 13, 1978)	4
Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979)	14
CONSTITUTIONS AND STATUTES:	
Federal:	
18 U.S.C. §1151	8,9
18 U.S.C. §1165	5,9,10 11
25 U.S.C. §349	14
11 Stat. 749, Treaty of Fort Laramie, 1851	5
State:	
Mont. Const. Art. IX, §1(3)	12
Mont. Rev. Codes Ann. §26-1501 *et seq.* (1947)	12
Mont. Rev. Codes Ann. §50-1034 *et seq.* (1947)	12
Mont. Rev. Codes Ann. §69-6501 *et seq.* (1947)	12
Mont. Rev. Codes Ann. §70-801 (1947)	12
MISCELLANEOUS:	
78 I.D. 101 (1971)	5
1960-1962 Ops. of the Atty Gen'l of Oregon	5
1953-1954 Ops. of the Atty Gen'l of New Mexico	5
1950-1952 Ops of the Atty Gen'l of Nevada	5
H. Rep. No. 625, 86th Cong., 1st Sess. (1959)	9
H. Rep. No. 2593, 85th Cong., 1st Sess. (1958)	9

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BRIEF OF AMICUS CURIAE INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES ON THE MERITS

The International Association of Fish and Wildlife Agencies, having obtained written consent of all parties to the case as required by Rule 36.2, submits this brief in support of petitioners.

INTEREST OF AMICUS

The International Association of Fish and Wildlife Agencies (hereinafter "the Association") is a voluntary, unincorporated association dedicated to coordinating the efforts of public administrative agencies responsible for the protection and management of the fish and wildlife of

North America. Founded at Yellowstone National Park in 1902, the Association numbers among its government members the fish and wildlife agencies of all fifty states.

The confusion by the Ninth Circuit of limited Indian sovereignty with general powers of government gives rise to the interest of the Association in this case. The Court of Appeals held that the Crow Tribe and the State of Montana exercise concurrent jurisdiction to regulate hunting and fishing by persons not members of the Crow Tribe on fee patented lands within the exterior boundaries of the Crow Reservation. While the power of the Crow Tribe, according to the court below, does not go so far as to permit an absolute proscription of hunting and fishing by nonmembers on lands owned by them, the Court of Appeals held that the Tribe does have power to regulate such hunting and fishing so long as "reasonable, nondiscriminatory, and consistent with sound principles of conservation." *United States* v. *State of Montana*, 604 F.2d 1162, 1172 (9th Cir. 1979).

The Association believes that the Court of Appeals erred in holding that the Crow Tribal Council may regulate hunting and fishing activities on fee patented lands. Interior holdings by nontribal members are extensive in western states. In the seven reservations located in Montana, interior holdings constitute large portions of the Blackfeet, Flathead, Fort Peck, and Crow reservations with lesser percentages in the Northern Cheyenne, Fort Belknap, and Rocky Boy reservations. In Idaho nearly ninety percent of the 756,000-acre Nez Perce Reservation is owned by nonmembers of the tribe and nearly eighty percent of the Coeur d' Alene Reservation of some 345,000 acres is owned by nonmembers. As to such lands, the Court of Appeals holds that an Indian tribe is empowered to proscribe actions by nonmembers which are authorized by the state. The Association believes that significant areas

of fee patented land other than those within the Crow Reservation are implicated by the holding below, that state jurisdiction over hunting and fishing on such lands is not concurrent but exclusive, and that the Court of Appeals erred in investing the Tribal Council with authority held by the State of Montana in this matter.

Amicus Association takes no position in this brief on the question of ownership of the bed and banks of the Big Horn River within the boundaries of the reservation.

SUMMARY OF ARGUMENT

1. Indian tribes possess limited sovereignty which arises from power over their territory and over their members. Indian tribes do not have sovereign power or authority respecting acts done by nonmembers on privately owned lands within a reservation unless Congress has specifically delegated such power. If treaty rights to hunt and fish are threatened with impairment by reason of acts of nonmembers occurring on fee patented lands within a reservation, the treaty right must be vindicated by application to the legislature or the courts.

2. The power to regulate is meaningful only when combined with the power to enforce. Congress has provided no sanction in the federal courts for hunting and fishing activities by nonmembers on fee patented lands within a reservation nor does the Court of Appeals give any indication as to how tribal regulation is to be enforced.

3. No allegation was made nor proof offered that hunting and fishing activities by nonmembers on fee lands were threatening to impair any treaty right. Without any finding of treaty right impairment, the Court of Appeals simply divested the state of a portion of its sovereign authority and vested it in the tribe. In so doing

the court performed an act which is essentially legislative in character and beyond its competence.

4. The power of the state over nonmembers on fee patent lands within a reservation is complete and perfect and the exercise of tribal power is not required to supplement ineffective state regulation. By contrast, tribal regulation of nonmembers on such interior holdings is ineffective because enforcement powers are denied the tribe.

ARGUMENT

The State of Montana Possesses Exclusive Authority To Regulate Hunting and Fishing by Non-Tribal Members on Fee Patented Lands Within the Crow Reservation. Any Impairment of Treaty Rights By Non-Tribal Members on Fee Patented Lands Must Be Vindicated by Application to the Legislature or the Courts and Not By Tribal Regulation.

In allocating jurisdictional responsibilities for regulation of hunting and fishing between the Crow Tribe and the State of Montana, the Court of Appeals concluded that the State's fish and game laws apply to nontribal members who obtain permission from the Tribe to hunt or fish within the limits of the reservation. The court was clearly correct in so holding.[1]

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[1] The following authorities hold that state hunting and fishing regulations are applicable to non-tribal members who hunt or fish within an Indian reservation. United States v. Sanford, 547 F.2d 1085 (9th Cir. 1976); White Mountain Apache Tribe v. Arizona, No. Civ. 77-867 (D. Ariz. June 13, 1978), appeal docketed, No. 78-3427 (9th Cir. November 8, 1978); Montana ex rel. Nepstad v. Danielson, 149 Mont. 438, 427 P.2d 689 (1967); Ex

(footnote continued)

The Court of Appeals held also that, as to fee patented lands, non-tribal-member resident owners or those whose occupancy is authorized, such as a tenant or an employee, may not be prohibited by the Tribe from hunting or fishing on the fee patented lands on which they reside but such activities may be regulated by the Tribe. Those who own fee patented lands but who do not reside thereon may, according to the Court of Appeals, be completely prohibited by the Tribe from hunting or fishing on their own land. Moreover, the freedom from absolute proscription enjoyed by the resident owner, his tenant or his employee, is an immunity which is held by the court to be lost if the individual attempts to hunt or fish on a tract other than the one on which he resides.

The precise rationale of the Court of Appeals for its allocation of jurisdiction between State and Tribe is not apparent but appears to be an amalgam of the following: (1) "the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described" accorded the Crow Tribe by Article 5 of the Treaty of 1851, a factor which, the court conceded, does not irrefutably establish the validity of tribal regulation; (2) the recognition by the court that the coverage of 18 U.S.C. § 1165 does not extend

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(footnote continues)

Parte Crosby, 38 Nev. 389, 149 Pac. 989 (1915); 78 I.D. 101 (1971); 1960-1962 Opinions of the Attorney General of Oregon, 11; 1953-1954 Opinions of the Attorney General of New Mexico, 511; 1950-1952 Opinions of the Attorney General of Nevada, 20. The 1971 Opinion of the Solicitor of the Department of the Interior, cited above, was withdrawn in 1974 but no reason was given for its withdrawal. Amicus Association is aware of two decisions which are *contra:* Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Comm'n, 588 F.2d 75 (4th Cir. 1978), petition for writ of certiorari voluntarily dismissed, 48 U.S.L.W. 3786 (May 22, 1980); and Mescalero Apache Tribe v. State of New Mexico, Civ. No. 77-395M (D.N.M. August 2, 1978), appeal docketed, No. 78-1790 (10th Cir. September 29, 1978).

to fee patented lands, a factor which militates against the court's holding; (3) the further recognition by the court that the Allotment Acts anticipated substantial assimilation and that Congress could not have intended that fee patentees might hunt and fish only with tribal consent, another factor militating against the court's holding; and (4) the fact that a federal statute had once prohibited non-Indian hunting in Indian country except for subsistence purposes, an item of historical but less certain legal interest.

We agree with the Court of Appeals that the Tribe may withhold its permission from any individual who wishes to go upon land belonging to the Tribe or upon land held by the United States in trust for the Tribe for the purpose of hunting or fishing. We further agree that should the Tribe permit nonmembers to enter upon such lands for the purpose of hunting or fishing the Tribe may condition access by the charge of a trespass fee and may also establish conditions such as bag and creel limits. We agree also that nonmembers of the Tribe who hunt or fish within the exterior boundaries of the Crow Reservation are subject to state fish and game laws. However, we believe the Court of Appeals erred in determining that the Crow Tribe has regulatory authority over nonmembers on fee patented lands and to a demonstration thereof we now turn.

1. THE EXTENT OF TRIBAL JURISDICTION OVER NON-TRIBAL MEMBERS IS NOT CO-EXTENSIVE WITH THE NEED TO PRESERVE INDIAN TREATY RIGHTS. Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory. *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975). Indian tribes possess those aspects of sovereignty not withdrawn by treaty or statute and not inconsistent with their dependent status. *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978). In upholding in major part the attempt by the

Tribe in Regulation 74-05 to regulate nonmember hunting and fishing on fee patented lands, the Court of Appeals finds support for its jurisdictional allocation scheme in the proposition that "modification of Indian treaty rights should be narrowly construed." *United States* v. *Montana*, 604 F.2d 1162, 1169 (9th Cir. 1979). The court below thus appears to say that because the treaty privilege respecting hunting and fishing might be impaired by nonmembers on fee patented land the Tribe has the right to regulate such individuals.

We are aware of no doctrine which measures the sovereign powers of an Indian tribe over nonmembers by the need to preserve treaty rights. Indeed, as this Court stated in *United States* v. *Wheeler*, 435 U.S. 313, 326 (1978), "The areas in which implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe." Indian tribes possess "attributes of sovereignty over both their members and their territory." 435 U.S. at 323. In the instant case, however, the Court of Appeals found attributes of sovereignty in the Crow Tribe over nonmembers for conduct occurring on lands neither owned by the tribe nor held in trust for their benefit. Amicus believes that limited Indian sovereignty simply does not extend to such subjects unless Congress has delegated authority to a tribe as in *United States* v. *Mazurie*, 419 U.S. 544, 558 (1975). The authority of an Indian tribe is based on the two elements of property and sovereignty over its members. When both elements are missing Indian authority simply does not exist.

The most that can be said of fee patented lands within the exterior boundaries of an Indian reservation is that, by their physical location, such lands may be implicated in the fulfillment of treaty rights. Nonmember owners and those residing on such former reservation lands may thus

be called upon to yield some part of the full measure of their property rights in order that the federal right be fulfilled. But, and this is a signally important condition not perceived by the Court of Appeals, fee patent owners may not be regulated by the Tribal Council or divested by it of rights enjoyed by other citizens of the state for that is manifestly beyond the reach of the tribe's limited sovereignty over its property and its members. If fee patent owners are to be deprived of hunting and fishing rights enjoyed by other citizens of the state it must occur by the action of a sovereign having powers of general government. The tribe, in other words, may not establish its own regulatory regime but must seek vindication of its treaty rights in the legislature or the courts. Thus, for example, federal courts have assumed jurisdiction over the question of what obligations the State of Washington owed to Indian tribes under the fishing rights provisions of treaties with the Northwest Tribes. The district court there specifically ordered state defendants to make reductions in non-Indian fishing so as to vindicate the treaty right of fishing at usual and accustomed places off the reservation. *United States* v. *Washington*, 384 F. Supp. 312, (W.D. Wash. 1974) *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). In the instant case, no allegation was made and no proof offered that treaty provisions relating to hunting and fishing were being impaired by nonmembers on fee patented lands within the reservation. The Court of Appeals, by investing the Tribe with jurisdiction over activities of non-tribal members on fee patent lands, simply left it to the Tribal Council to decide on the nature of the treaty right and that was improper.

2. CONGRESS DELIBERATELY CHOSE TO EXCLUDE FEE PATENTED LANDS FROM THE PROVISIONS OF THE FEDERAL TRESPASS STATUTE. Whereas "Indian country" is defined at 18 U.S.C. § 1151 to include fee patented lands within

the exterior boundaries of an Indian reservation, the federal trespass statute at 18 U.S.C. § 1165 excludes such lands. Legislative history discloses that the purpose of the enactment was to establish federal protection for land belonging to an Indian tribe or held by the United States in trust for the tribe because Indian tribal law was enforceable only against Indians.

"While non-Indians are subject to State laws when they go on Indian reservations, many of the States do not have criminal trespass laws and in other States the Indians find it most difficult to comply with the requirements of State laws designed to control trespass." H. Rep. No. 625, 86th Cong., 1st Sess. 2 (1959). Section 1165 ensured that trespassers onto Indian land would not be immune. For our purposes, however, it is of more than passing interest that the bill as originally proposed by the House Committee on the Judiciary used the words "Indian country" as the territory subject to the trespass statute. In a letter to the Committee dated May 23, 1958, the Assistant Secretary of the Interior recommended the present language of section 1165 because it was "more precise." H. Rep. No. 2593, 85th Cong., 2d Sess. 3-5 (1958). The Committee deliberately adopted the present language which includes only lands held or controlled by Indians or the United States. The exclusion of fee patented land is established both by reference to the statute and by reference to its legislative history.

Moreover, the reason for use by Congress of the broader term "Indian country" in 18 U.S.C. § 1151 related to the purpose of the Major Crimes Act. Congress was clear that where an Indian committed an offense against a white man or vice versa in Indian country federal jurisdiction should be exclusive. Fee patented lands were included because, if the existence *vel non* of federal jurisdiction were to depend upon the ownership of particular parcels of land, law enforcement officers would

find it necessary to search tract books in order to determine whether criminal jurisdiction over the offense, even though it be committed within the reservation, is in the state or the federal government. See *Seymour* v. *Superintendent*, 368 U.S. 351, 358 (1962). Such an impractical pattern of checkerboard jurisdiction was avoided by section 1151. Section 1165, by contrast, did not pose the same problem because jurisdiction of the state over non-Indians for fish and game violations within the boundaries of a reservation had long been recognized.

3. THE COURT OF APPEALS ASCRIBED TO THE TRIBE A RIGHT TO REGULATE, BUT THE POWER TO ENFORCE ITS REGULATIONS IS NOT APPARENT. Nowhere in its opinion does the Court of Appeals suggest how tribal regulations affecting hunting and fishing activities by nonmembers on fee patented land will be enforced. As the Ninth Circuit has stated in a related context, "The power to regulate is only meaningful when combined with the power to enforce." *Settler* v. *Lameer*, 507 F.2d 231, 238 (9th Cir. 1974). The term "jurisdiction" means the power to regulate, i.e., the authority to enforce regulation against unwilling persons through coercive instruments of government. See *Wedding* v. *Meyler*, 192 U.S. 573, 584 (1904). How will the Tribe's absolute proscriptions and regulation which is less than absolute proscription be enforced?

Non-tribal members may not be tried on criminal charges in tribal courts. *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978). Additionally, 18 U.S.C. § 1165 does not apply to entry on to fee patented land for the purpose of hunting or fishing.[2] If the Court of Appeals means to suggest that tribal agents may enforce tribal regulations on fee patented land, then the source of that

[2] See United States v. Bouchard, 464 F. Supp. 1316, 1338 (W.D. Wisc. 1978); United States v. Pollman, 364 F. Supp. 995 (D. Mont. 1973).

authority is not apparent. Such authority certainly does not spring from "inherent powers of limited sovereignty." Nor is 18 U.S.C. § 1165 available to enforce tribal regulation on fee patented land. As Judge Jameson stated in *United States* v. *Pollman*, "It is 18 U.S.C. § 1165 rather than the ordinance of the Confederated Tribes which defines criminal conduct." 364 F. Supp. at 1002. While legal fictions have their uses, it would be an intolerable fiction to charge criminal trespass against an individual for activity on land which he himself owned.[3]

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[3] The practical and conceptual difficulties raised by the court's holding go beyond the question of enforcement of tribal regulation. If the tribe has power to regulate hunting and fishing by non-tribal members on fee lands why does it not have power to proscribe such activities completely? The tribe has such power over members and if the tribal power is linked to preservation of the treaty privilege to hunt and fish, then one would expect the power to be commensurate with preservation of the privilege. If the tribal power stems instead from the treaty right to occupancy of the lands within the exterior boundaries of the reservation, there can be no doubt that an event has occurred—the issuance by the United States of fee patents—which is inconsistent with "the absolute and undisturbed use and occupancy of the Indians." If non-resident owners occupy a lower status than resident owners, may the tribe establish residency requirements for the absentee owner who wishes to return and become immune from absolute proscription by the tribal council? If tribal regulation of hunting and fishing by non-members of the tribe on fee lands must be "reasonable, nondiscriminatory, and consistent with sound principles of conservation," 604 F.2d at 1172, how is the question of discrimination to be resolved? If fee patent owners are to be compared with tribal members in determining whether discrimination exists, then the tribal member who possesses through the tribe a treaty "privilege" to hunt and fish may consider the comparison disadvantageous. If fee patent owners are to be compared with the treatment accorded by the tribe to other fee patent owners, then the nondiscrimination requirement might well prove anemic.

Were this a case where the state had abdicated its responsibility for protection and management of wildlife or had fashioned its seasons and bag limits so as to threaten to impair treaty rights the exercise of judicial powers might be warranted.[4] But even so it would be a matter for judicial determination. In the Northwest Treaty tribes case an issue before Judge Boldt was whether a tribe had authority to enforce its off-reservation fishing regulations against persons not members of the tribe. Answering in the negative the court stated:

> A self-regulating tribe has authority only over its own members. However, the tribes should report apparent misuse of the fishery to the state

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[4] No such proof was offered and any such proffer would likely be unavailing. Montana has taken an aggressive stance to preserve fish and wildlife found within the state. Article IX, Section 1(3) of the 1972 Constitution of Montana states: "The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources." A number of important legislative actions have been taken in this spirit. In 1963 the Montana legislature enacted the Stream Preservation Act, Mont. Rev. Codes Ann. §26-1501 *et seq.* (1947), the first state law of its kind. Policy of the Act is stated as follows: "It is hereby declared to be the policy of the State of Montana that its fish and wildlife resources and particularly the fishing waters within the state are to be protected and preserved to the end that they be available for all time, without change, in their natural existing state except as may be necessary and appropriate after due consideration of all factors involved." §26-1501. This enactment was followed by the Environmental Policy Act of 1971, Mont. Rev. Codes Ann. §69-6501 *et seq.* (1947), the Utility Siting Act of 1973, Mont. Rev. Codes Ann. §70-801 *et seq.* (1947) and the Montana Strip Mining and Reclamation Act of 1974, Mont. Rev. Codes Ann. §50-1034 *et seq.* (1947). These statutes regulate economic development within the state.

> if a non-Indian is involved or to the tribe of a treaty right fisherman, and if appropriate action is not taken, such report should be brought to the court for such action as the court finds appropriate.

United States v. *Washington*, 384 F. Supp. 312, 410-411 (W.D. Wash. 1974). In the instant case, without the triggering effect of a finding of treaty right impairment, the Court of Appeals simply vested the Crow Tribe with regulatory jurisdiction. In so doing it took upon itself the exercise of an act whch is "essentially legislative in character." Cf. *Oklahoma Tax Comm'n* v. *Texas Co.*, 336 U.S. 342, 365-366 (1949). Even the language used by the Court of Appeals is the language of accommodation familiar to the legislature.[5] Congress might have delegated to the Crow Tribe the power to regular nonmember hunting and fishing on fee patent lands, *United States* v. *Mazurie*, 419 U.S. 544 (1975), or Congress might have broadened 18 U.S.C. § 1165 to cover unauthorized hunting or fishing on fee patent lands. Congress, however, did neither.

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[5] "[O]ur task is to keep faith with the Indian while effectively acknowledging that Indians and non-Indians alike are members of our Nation. Both seek power and gain through identical processes, viz. commerce, politics, and litigation. We must, however, live together, a process not enhanced by unbending insistence on supposed legal rights which if found to exist may well yield tainted gains helpful to neither Indians nor non-Indians." 604 F. 2d at 1169. Were this passage simply the peroration at the end of a rigorous legal analysis it would be unexceptional. However, the passage is not a peroration but instead marks one of the few passages in the court's opinion on this issue which possesses any explanatory power. Even the Solicitor General characterizes the court's action as a "modest accommodation of interests." Brief for the United States in Opposition to Petition for Writ of Certiorari, p. 14.

4. THE STATE POSSESSES "COMPLETE AND PERFECT" JURISDICTION OVER NON-INDIANS ON FEE PATENT LANDS, AND TRIBAL POWER IS NOT ESSENTIAL TO SUPPLEMENT INEFFECTIVE STATE REGULATION. Enforcement powers are not denied the state as was the case in *Settler* v. *Lameer*, 507 F.2d 231 (9th Cir. 1974), which involved power of the state to regulate Indian off-reservation fishing. Indeed the situation here is the reverse of that in *Settler* for here the enforcement powers are available to the state but not to the tribe. All incidents of ownership of the fee patented land are subject to determination by applicable state law, *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 (1979), and Montana law governs with respect to property rights. *Dillon* v. *Antler Land Co.*, 507 F.2d 940, 942 (9th Cir. 1974). Issuance of a fee patent freed the United States from its duties and obligations to the Indians with respect to the lands it theretofore held in trust and defined a new status of those Indians in their relation to the state. *Id.* at 944. Application of state law to the fee patent land is required by statute. 25 U.S.C. § 349. State authority is thus "perfect and complete" while the tribal authority found by the Court of Appeals is based neither on proprietary interest of the tribe or of the United States, on powers of enforcement delegated by Congress to the tribe, or on powers of enforcement delegated to United States Attorneys.

CONCLUSION

For all the reasons set forth above, Amicus Association believes the decision of the court below should be reversed insofar as it holds that the Crow Tribal Council has authority to regulate hunting and fishing by non-tribal members on fee patented land within the Crow Reservation.

Respectfully submitted,

INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES

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